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IN THE

Supreme Court of the United States

OCTOBER TERM 1974-1975

NO. 74-778

NORMAN R. McHENRY

and

CORNELIUS SIMS BRADY,
Petitioners,

v.

CITY OF MOBILE,
a municipal corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974-1975

NO._____

NORMAN R. McHENRY

and

CORNELIUS SIMS BRADY,
Petitioners,

v.

CITY OF MOBILE,
a municipal corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioners respectfully pray that a writ of certiorari issue to review the order of the Court of Criminal Appeals of Alabama entered on March 19, 1974, remanding this cause to the Circuit Court of Mobile County, Alabama, for certain determinations of fact.

OPINIONS BELOW

The Court of Criminal Appeals of Alabama remanded with directions Petitioners' appeal to that court on March 19, 1974, which said opinion is reported at 53 Ala. App. _____, 299 So.2d 779, and a copy of said opinion is appended hereto as Exhibit "A".

On June 18, 1974, the Supreme Court of Alabama initially granted a writ of certiorari to review the decision of the Court of Criminal Appeals of Alabama, and on August 29, 1974, quashed said writ as being improvidently granted. Although, no opinion was rendered by the Supreme Court of Alabama, the actions of that court are reported at 292 Ala._____, 299 So.2d 779, and a copy of the report of the proceedings of said court is appended hereto as Exhibit "B".

The Supreme Court of Alabama overruled Petitioners' application for rehearing on September 19, 1974, without opinion. A copy of the order is attached hereto as Exhibit "C".

JURISDICTION

The final order of the Supreme Court of Alabama overruling Petitioners' application for rehearing was made and entered on September 19, 1974. The jurisdiction of this Court is invoked under Title 28, Section 1257 (3), *United States Code.*

QUESTIONS PRESENTED

The following are the questions presented for review:

I.

May a motion picture alleged to be obscene be seized without a search warrant, but pursuant to an arrest war-

rant for the projectionist and manager of the theater exhibiting said film issued by a neutral magistrate after viewing said film, but prior to an adversary hearing?

II.

Must the prosecution prove in an obscenity prosecution that the Defendant has knowledge of the material which is alleged to be obscene?

III.

Is an ordinance attempting to regulate obscenity unconstitutional if it fails to specifically define sexual conduct which is prohibited, or which precludes a determination of whether a work alleged to be obscene, when taken as a whole, lacks serious literary, artistic, political or scientific value?

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The constitutional provisions involved are the First, Fifth and Fourteenth Amendments to the *United States Constitution*. The ordinance involved is City of Mobile Ordinance No. 36-022, as amended, which said ordinance and pertinent amendments are appended hereto as Exhibit "D".

STATEMENT OF THE CASE

The Petitioners, NORMAN R. McHENRY and CORNELIUS SIMS BRADY, were the manager and projectionist, respectively, of the Midtown Cinema, a local theater in the City of Mobile, Alabama (Tr. 83-84; 82).

They were arrested on July 22, 1972, by police officers of the City of Mobile, for allegedly exhibiting an obscene motion picture, viz: "Pornography-Prostitution, U.S.A.", in violation of City of Mobile Ordinance No. 36-022, as amended (Tr. 88).

At the time of the arrest of the Petitioners, the police had two (2) "John Doe" warrants for the arrest of the manager and the projectionist of the Midtown Cinema (Tr. 88). Although the police had no search warrant, they seized the alleged obscene film allegedly exhibited by the Petitioners, viz: "Pornography-Prostitution, U.S.A." (Tr. 88).

The Petitioners have raised three (3) questions for review by this court; namely, that the film was unlawfully seized because no search warrant was issued for the film itself; that the prosecution failed to prove the element of scienter, which Petitioners assert is necessary for a conviction; and that the ordinance under which the Petitioners were convicted is unconstitutional in that it fails to specifically define sexual conduct which is prohibited, and precludes a determination by the fact finder of whether a work has serious literary, artistic, political, or scientific value.

With respect to the seizure of the film, the Petitioners first raised this issue to the trial court by objection to the introduction of the film into evidence (Tr. 107-108). This issue was specifically raised in the Assignments of Error filed by Petitioners in the Court of Criminal Appeals of Alabama; in the Application for Rehearing filed in the Court of Criminal Appeals of Alabama; and in all of the briefs filed by Petitioners in the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama.

The total failure of the prosecution to prove the essential element of scienter was raised in motions to exclude filed by Petitioners in the trial court, which said motions were denied by the trial court, notwithstanding that said motions included grounds setting forth that the evidence was insufficient to support a verdict of guilty and that the City of Mobile failed to prove a prima facie case (Tr. 11-13; 30-31). This issue was also raised in the Assignments of Error filed by the Petitioners filed in the Court of Criminal Appeals of Alabama; and in all of the briefs filed by Petitioners in the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama.

The Petitioners also raised in the trial court, by way of demurrer to the complaint filed by the City of Mobile against the Petitioners, the issue that the said City of Mobile Ordinance No. 36-022, as amended, was unconstitutional, in that it failed to specifically define prohibited sexual conduct and precluded a determination of whether a work alleged to be obscene, when taken as a whole, lacks serious literary, artistic, political, or scientific value, which said demurrers were overruled by the trial court (Tr. 6-10; 24-29). This issue was also raised in the Assignments of Error filed by Petitioners in the Court of Criminal Appeals of Alabama, and in the briefs filed by Petitioners in the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama.

REASONS RELIED ON FOR THE ISSUANCE OF THE WRIT

I.

The Petitioners, NORMAN R. McHENRY and CORNELIUS SIMS BRADY, who were, respectively, the manager and projectionist of the Midtown Cinema, a local

theater in Mobile, Alabama, were arrested on "John Doe" warrants issued for the arrest of the manager and the projectionist of said Midtown Cinema (Tr. 86). The record shows that the Petitioners were arrested for allegedly exhibiting an obscene motion picture, and that the film upon which the prosecutions were based was seized without a warrant (Tr. 86). In fact, a portion of the opinion of the Court of Criminal Appeals of Alabama, which is attached hereto as Exhibit "A", reads as follows:

> "The film was seized as an incident to the arrests of the projectionist and manager of the cinema."

No evidence other than the film itself and the ordinance involved were presented by the City of Mobile in the trial court; therefore, if the film was not due to be admitted into evidence, then the convictions of the Petitioners must be reversed.

This court, in the case of *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973), held that a film may not be seized without a warrant as an incident to an arrest, and made the following statement:

> ". . . ordinary human experience should teach that the seizure of a movie film from a commercial theater with regularly scheduled performances, where a film is being played and replayed to paid audiences, presents a very different situation from that in which contraband is changing hands or where a robbery or assault is being perpetrated. In the latter settings, the probable cause for an arrest might justify the seizure of weapons, or other evidence or instruments of crime, without a warrant."

This court went on to say in the *Roaden* case, supra, that a seizure prior to an adversary hearing may be valid,

but only if the seizure is pursuant to a lawful warrant. The evidence is without dispute that there was no search warrant for the film in the case sub judice.

II.

Petitioners also urge this Honorable Court to grant the writ of certiorari and to reverse Petitioners' convictions for the reason that in the trial court the City of Mobile entirely failed to prove the vital element of scienter on the part of the Petitioners. The law seems well established that proof of such element is necessary in an obscenity prosecution, and that the burden is on the prosecution to prove that the Defendant had knowledge of the material which is alleged to be obscene. *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205, reh. den. 361 U.S. 950, 80 S.Ct. 399, 4 L.Ed.2d 383. (1959). *United States v. Gundlach*, 345 F.Supp. 709 (M.D. Pa., 1972). *Star v. Preller*, 352 F.Supp. 530 (D.C. Md., 1972). *State v. Lavin*, 204 N.W.2d 844 (Iowa, 1973). Additionally, Section 2 of City of Mobile Ordinance No. 36-022, as amended, under which the Petitioners were prosecuted, provides in part as follows:

> "Every person who *knowingly* prepares, sells, exhibits or commercially distributes . . . any obscene, printed or written matter or materials, shall be guilty of an offense . . ." (emphasis supplied).

There is absolutely no evidence in the record in this cause from which a jury could draw an inference that the Petitioners had knowledge of the contents of the alleged obscene film which the Petitioners allegedly exhibited. The evidence was uncontradicted that the Petitioner, McHenry, did not view the film forming the basis of the prosecution

(Tr. 125-126), and is devoid of any evidence that the Petitioner, Brady ever viewed said film.

III.

Lastly, Petitioners urge the court to grant the writ of certiorari for the reason that the ordinance under which the Petitioners were prosecuted is unconstitutional. A copy of that ordinance is attached hereto as Exhibit "D".

The ordinance provides, as amended by City of Mobile Ordinance No. 41-183, that:

> "As a matter of state and City of Mobile public policy, obscenity is utterly without redeeming social importance and constitutes a public nuisance which should be abated."

This court in the case of *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), set forth the obscenity test that if the average person, applying contemporary community standards would find that, taken as a whole, the work appeals to the prurient interests; that it depicts or describes in a patently offensive way sexual conduct that is specifically defined by state law; and that, taken as a whole, it lacks serious literary, artistic, political, or scientific value. The test prior to the *Miller* case had included the test that a work must be "utterly without redeeming social importance".

City of Mobile Ordinance No. 36-022, as amended, was drafted prior to the *Miller* case, and was obviously designed to preclude a determination of whether or not a work alleged to be obscene was utterly without redeeming social value, and the test specifically precludes that element. Even under the *Miller* test a work must lack serious literary, artistic, political, or scientific value. Therefore,

the provision in the ordinance that obscenity is utterly without redeeming social importance renders the entire ordinance unconstitutional, and precludes a determination by the jury of whether or not a work has any social value.

Furthermore, the ordinance fails to define prohibited conduct. In the *Miller* case, supra, this court said:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."

CONCLUSION

In conclusion, the Petitioners urge this Honorable Court to grant the writ of certiorari to the Supreme Court of Alabama.

Respectfully submitted,

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Of Counsel:

McDERMOTT, SLEPIAN,
KITTRELL & FLEMING

CERTIFICATE OF SERVICE

I, BRAXTON L. KITTRELL, JR., Attorney for Petitioners, hereby certify that on the ____ day of December, 1974, I served a copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Alabama upon Chandler K. Stanard, Esquire, Attorney for the City of Mobile, 2502 First National Building, Mobile, Alabama, and upon Honorable William J. Baxley, Attorney General for the State of Alabama, Montgomery, Alabama 36104, by mailing the same to each by First Class United States mail, postage prepaid.

BRAXTON L. KITTRELL, JR.

EXHIBIT "A"

THE STATE OF ALABAMA—
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1973-74

1 Div. 395

Cornelius Sims Brady and N. R. McHenry

v.

City of Mobile

Appeal from Mobile Circuit Court

CATES, PRESIDING JUDGE

Ordinance breach for exhibiting an obscene film.

The film was seized as an incident to the arrests of the projectionist and manager of the cinema. No copy was made. No adversary proceeding for a judicial determination was available following seizure. A provision for a hearing before seizure in Ordinance 41-085 had been repealed.

We remand to the trial court to ascertain the applicability of *Heller v. New York* (June 25, 1973)____U.S. ____and cases therein cited.

REMANDED WITH DIRECTIONS.

All the Judges concur.

EXHIBIT "B"

In re Norman R. McHENRY and Cornelius Sims Brady

v.

CITY OF MOBILE

Ex parte Norman R. McHenry and Cornelius Sims Brady

SC 840

Supreme Court of Alabama

August 29, 1974

Rehearing Denied September 19, 1974

Certiorari to the Court of Criminal Appeals.

Braxton L. Kittrell, Jr., Mobile, for petitioner.

No brief for respondent.

FAULKNER, Justice.

Petition of Norman R. McHenry and Cornelius Sims Brady for Certiorari to the Court of Criminal Appeals to review and revise the judgment and decision of that Court in Brady v. City of Mobile, 53 Ala. App.____, 299 So.2d 779.

Writ granted;

Writ quashed as being improvidently granted.

HEFLIN, C. J., and MERRILL, HARWOOD and MADDOX, JJ., concur.

EXHIBIT "C"

OFFICE OF
CLERK OF THE SUPREME COURT

STATE OF ALABAMA
MONTGOMERY

Re: SC 840

EX PARTE: NORMAN R. McHENRY AND CORNELIUS SIMS BRADY, PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

v.

(Re: McHenry and Appellant Brady v. City of Mobile)
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

____| Petition for Writ of Certiorari denied. No opinion.

____| Submitted on briefs

____| Appellant granted additional time to file transcript of record to and including

xxxx| Application for rehearing overruled. No opinion.

____| Appell____granted 15 additional days to file briefs to and including

____| Appell____granted 15 additional days to file reply briefs to and including

____| Transcript filed (Notice under Rule 12)

____| Permission to file amicus curiae briefs granted

____| Permission to make additional assignments of error granted.

____|

J. O. SENTELL
Clerk, Supreme Court of Alabama

September 19, 1974

EXHIBIT "D"

36-022 1966

AN ORDINANCE PROHIBITING THE POSSESSION, DISTRIBUTION OR SALE OF OBSCENE MATERIAL WITHIN THE CITY OF MOBILE, AND ITS POLICE JURISDICTION

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MOBILE, ALABAMA, as follows:

Section 1. The following words, terms, phrases used in this ordinance shall, for the purpose of this ordinance, have the meaning respectively ascribed to them in this Section.

(a) Obscene—means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest.

(b) Person—means any individual, partnership, firm, association, corporation, or other legal entity.

(c) Printed or Written Matter or Material—means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic books, story book or other printed or written matter but does not include written or printed matter or material used by or in any religious, scientific or educational institution.

(d) Licensee—means any person holding a City of Mobile business license.

Section 2. Every person who prepares, sells, exhibits or commercially distributes or gives away or offers to give

away or has in his possession with intent to sell or commercially distribute or to give away or offer to give away, any obscene, printed or written matter or material, shall be guilty of an offense against the City of Mobile and shall be punished as hereinafter provided.

Section 3. Every person who has in his possession any obscene printed or written matter or material shall be guilty of an offense against the City of Mobile and upon conviction shall be punished as hereinafter provided.

Section 4. Any person found guilty of violating any provision of this ordinance shall be fined in an amount not exceeding the sum of ONE HUNDRED DOLLARS ($100.00) or may be sentenced to the City Jail or to hard labor for the City for not exceeding six (6) months, or by both such fine and imprisonment or hard labor, in the discretion of the Court trying the case. Each day any violation of any provision of this ordinance shall continue shall constitute a separate offense.

Section 5. In addition to any penalty provision of this ordinance, should the Board of Commissioners of the City of Mobile be reasonably satisfied from evidence presented to it that a licensee is violating any provision of this ordinance, then the license or licenses held by such licensee may be suspended or revoked in the discretion of the Board of Commissioners of the City of Mobile, for a term not exceeding the term of such licenses. The procedure for revocation or suspension of any license held by a licensee shall be as set forth in the provisions of the License Code of the City of Mobile, adopted December 21, 1954, as amended by the provisions of an ordinance adopted on December 12, 1961, the provisions of which are incorporated herein as fully as if herein set forth in full.

Section 6. It is hereby declared to be the intention of the Board of Commissioners that the sections, paragraphs, sentences, clauses, phrases of this ordinance are severable and if any phrase, clause, sentence, paragraph or section of this ordinance shall be declared unconstitutional or invalid by any Court of competent jurisdiction, such unconstitutionality or invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance since the same would have been enacted by the Board of Commissioners without the incorporation of this ordinance of any such unconstitutional or invalid phrase, clause, sentence, paragraph or section.

Section 7. This ordinance shall apply and be effective in the City of Mobile and its police jurisdiction.

Section 8. This ordinance shall be in full force and effect from and after its adoption and publication as required by law.

ADOPTED: March 29, 1966

RICHARD L. SMITH
City Clerk

41-196 1967

AN ORDINANCE AMENDING ORDINANCE NO. 36-022 ADOPTED MARCH 29, 1966 AND ENTITLED, "AN ORDINANCE PROHIBITING THE POSESSION, DISTRIBUTION OR SALE OF OBSCENE MATERIAL WITHIN THE CITY OF MOBILE, AND ITS POLICE JURISDICTION"

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MOBILE, ALABAMA, that Sub-section (c) of Section 1 of Ordinance No. 36-022 adopted March 29, 1966 and entitled, "An Ordinance Prohibiting the Possession, Distribution or Sale of Obscene Material Within the City of Mobile, and Its Police Jurisdiction," is hereby amended to read as follows:

Section 1(c). Printed or Written Matter or Material—means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic books, story book, photograph, motion picture, negatives, or other printed or written matter but does not include written or printed matter or material used by or in any religious, scientific or educational institution.

ADOPTED: December 12, 1967

RICHARD L. SMITH
City Clerk

41-183 1969

AN ORDINANCE AMENDING ORDINANCE NO. 36-022 ADOPTED MARCH 29, 1966 AND ENTITLED, "AN ORDINANCE PROHIBITING THE POSSESSION, DISTRIBUTION OR SALE OF OBSCENE MATERIAL WITHIN THE CITY OF MOBILE, AND ITS POLICE JURISDICTION"

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MOBILE, ALABAMA, that Sub-section (a) of Section 1, and Section 2 of Ordinance No. 36-022 adopted March 29, 1966 and entitled, "An Ordinance Prohibiting the Possession, Distribution or Sale of Obscene Material Within the City of Mobile, and its Police Jurisdiction," are hereby amended to read as follows:

Section 1(a). A thing is "obscene" if, by contemporary community standards, and considered as a whole, its predominant appeal is to prurient interest. As a matter of state and City of Mobile public policy, obscenity is utterly without redeeming social importance and constitutes a public nuisance which should be abated.

Section 2. Every person who knowingly prepares, sells, exhibits or *commercially distributes* or gives away or offers to give away or has in his possession with intent to sell or commercially distribute or to give away or offer to give away, any obscene, printed or written matter of material, shall be guilty of an offense against the City of Mobile and shall be punished as hereinafter provided.

BE IT FURTHER ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MOBILE, ALABAMA, that Section 3 and Section 5 of Ordinance

No. 36-022 adopted March 29, 1966, and entitled, "An Ordinance Prohibiting the Possession, Distribution or Sale of Obscene Material Within the City of Mobile, and Its Police Jurisdiction", are hereby deleted from said ordinance.

Section 3. This ordinance shall be effective on the date of its adoption and shall remain in full force and effect and apply to each calendar year thereafter from year to year.

Section 4. Each and every provision of this ordinance is hereby declared to be an independent provision and the holding of any provision hereof to be void and invalid shall not affect any other provision hereof, and it is hereby declared that the other provisions of this ordinance would have been enacted regardless of any provision which might have been held invalid.

ADOPTED: November 18, 1969

HELEN B. DANNER
Acting City Clerk

41-085

AN ORDINANCE SETTING PROCEDURES FOR ARREST AND SEIZURE OF MOTION PICTURE FILMS SUBJECT TO CITY OF MOBILE ORDINANCE NO. 36-022 AS AMENDED

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MOBILE, ALABAMA, that in those cases, and only in those cases where a complaint under the obscenity ordinances of the City of Mobile arises out of the commercial exhibition or distribution of a motion picture film, the following procedure is to be followed:

Section 1. Upon complaint being made to the Recorder of the City of Mobile Recorder's Court that a motion picture film is being shown in violation of City of Mobile Ordinance No. 36-022, the Recorder may attend the showing and view the subject film for the purpose of determining whether or not said film is obscene and whether or not probable cause exists for the issuance of an arrest warrant; if the Recorder determines that the film is obscene and that probable cause does exist, then a warrant may be issued and the film may be seized. After seizure of the film the Recorder shall set the matter for hearing on the question of whether or not the film is obscene; said hearing to be held not less than twenty-four (24) hours and not more than seventy-two (72) hours after said seizure. Notice of the hearing shall be served upon the person against whom the arrest warrant is issued and he may be present at such hearing and present any legal evidence concerning whether or not the film is obscene. If, after this hearing, the Recorder should determine that the film is not obscene, then the film shall be returned to the owner

or exhibitor and the warrant dismissed. If, however, the film should be determined to be obscene, it may be retained and may be introduced in evidence on the trial of the case and any subsequent appeals.

Section 2. In the alternative, upon complaint being made to a Recorder of the City of Mobile Recorder's Court that a person, firm or corporation has in its possession with the intent to sell or commercially distribute, or is preparing, selling, exhibiting or commercially distributing, any obscene motion picture film, the Recorder receiving such complaint shall set down for hearing the question of whether or not probable cause exists to believe that an offense has been or is being committed. The person, firm or corporation complained against in said complaint shall by order of the Recorder be served personally by an officer of the Mobile Police Department with a notice of the name of the film and of the time and place of said hearing and the nature thereof; the matter is to be set for hearing not less than twenty-four (24) hours nor more than seventy-two (72) hours after the filing of the original complaint.

At the hearing hereinabove provided for, the sole question to be considered is: Whether or not the film made the subject matter of the hearing is obscene as defined by Ordinance No. 36-022 as amended.

At the hearing hereinabove provided for, evidence shall be submitted in accordance with the usual rules governing the issuance of search and arrest warrants in the State of Alabama with the exception that the person, firm or corporation complained against may, if they choose to attend such hearing, be represented by counsel, cross examine witnesses and present evidence and witnesses in their own

behalf. Such evidence may include, but is not limited to, affidavits of persons viewing the film, recordings, transcripts, narrations or other method of depicting the content of the film; *the consideration of the film itself shall be unnecessary unless the person,* firm or corporation complained against submits same for consideration at said hearing.

After receiving said notice, said person, firm or corporation shall retain the subject film unaltered in its possession and within the jurisdiction of the Recorder's Court of the City of Mobile during the pendancy of the hearing; if the hearing should result in a determination that the film is not obscene, then the party in possession of the film shall be free to take any lawful action with regard to the film; however, if the hearing should result in a determination that the subject film is obscene, then the party in possession of said film must maintain the film in an unaltered state within the jurisdiction of the Recorder's Court of the City of Mobile; said film may then only be relinquished to an officer of the law pursuant to an arrest warrant issued after the subject hearing. Any violation of this subsection shall be punished under the provisions of Section 1-4 of the Code of the City of Mobile.

Section 3. Each and every provision of this ordinance is hereby declared to be an independent provision and the holding of any provision hereof, to be void and invalid shall not affect any other provision hereof, and it is hereby declared that the other provisions of this ordinance would have been enacted regardless of any provision which might have been held invalid.

ADOPTED: May 20, 1970

HELEN B. DANNER
Acting City Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974-1975

No. 74-776

NORMAN R. McHENRY and CORNELIUS SIMS BRADY,
Petitioners,

vs.

CITY OF MOBILE,
Respondent.

BRIEF OF RESPONDENT
In Lieu of Motion to Dismiss

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974-1975

No. 74-778

NORMAN R. McHENRY and CORNELIUS SIMS BRADY,
Petitioners,

vs.

CITY OF MOBILE,
Respondent.

BRIEF OF RESPONDENT
In Lieu of Motion to Dismiss

"OPINIONS" BELOW

No "Final Judgment or Opinion" entered. Exhibits A, B, and C, Petitioners' Petition.

JURISDICTION

Petitioners' Exhibits A, B, and C show that the inferred ground of Jurisdiction is non-existent.

Petitioners' Exhibits B and C, evidence that the discretionary power of the Supreme Court of Alabama to grant a Writ of

Certiorari was not exercised. Denial of the Writ was not an expression by the Alabama Supreme Court on the merits of the case. *Cooper v. State*, 287 Ala. 728, 252 So. 2d 108 (1971); ex parte *Ditton*, 292 Ala. 493, 295 So. 2d 412 (1974). Therefore, there is no "Final Judgment or Decree" by the Supreme Court of Alabama to comply with the first essential of Title 28, Section 1257(3), United States Code, requiring such "Final Judgment or Decree".

The Court of Criminal Appeals of Alabama has exclusive appellate jurisdiction of misdemeanors, including the violation of town and city ordinances, said court also having original jurisdiction and authority in the issuance and determination of remedial and original writs as are necessary to give it a general superintendence and control of jurisdiction inferior to it and in matters over which it has exclusive appellate jurisdiction. Code of Alabama, Title 13, Section 111(2) (4).

Though a Writ of Certiorari would not be appropriate to the Supreme Court of Alabama, said Writ could issue to the Court of Criminal Appeals of Alabama, if the requirements of Title 28, Section 1257 are met. *Western Union v. Priester*, 276 U. S. 252, 48 Sup. Ct. 234, 72 L. Ed. 555 (1928).

Exhibit A of Petitioners' Petition, being a writ of the Court of Criminal Appeals of Alabama, shows said Court to have remanded the appeals of Petitioners to the trial court for application of appropriate law in light of rulings by the U. S. Supreme Court, specifically *Heller v. New York*, 93 S. Ct. 2789 (1973), and cases cited therein, decided subsequent to the trial of Petitioners on February 27, 1973.

Petitioners' Petition, Exhibits A, B, and C, show the only actions taken by appellate courts in this matter, and show no "Final Judgment or Decree", the first requirement of Title 28, Section 1257, as a basis for jurisdiction.

"The requirement that a final judgment or decree be rendered by the highest court of the state (having appellate jurisdiction) before the Supreme Court may intervene in state litigation is not a mere technicality, to be easily scorned, but an important factor in the smooth working of our federal system." (Parenthesis added.) *Mont. Bldg. & Const. v. Ledbetter*, Ala. 1952, 344 U.S. 178; 73 S. Ct. 196, 97 L. Ed. 204.

STATEMENT OF THE CASE

If it could be thought that issues can be considered in spite of the state of this record, a statement of the case, in addition to the transcript, would include Petitioners' "Opinions Below" and Exhibits. To comport with the facts so shown, and the transcript, and additional facts as are known to Petitioners, the following specifics must be considered:

Page 21 of the Petition contains a copy of an ordinance (41-085) of the City of Mobile, which is not an amendment to the Obscenity Ordinance of the City, but is rather a separate evidentiary ordinance passed to comply, in movie film prosecutions, with the dictates of *Entertainment Ventures v. Brewer*, 306 F. Supp. 802, 812 (Hdn 7-9) (M. D. Ala.) (Three Judges Court) 1969. Ordinance 41-085 at the time of arrest and trial of petitioners did not contain Section 2, as shown on page 22 of the Petition. See Tr. 51, for amendment of 41-085.

At no place in the Petition do Petitioners even intimate that the procedures of Section 1 of Ordinance 41-085, as amended by Ordinance 41-166, were not precisely afforded to these Petitioners. Consequently, in fact, valid warrants for the arrest of Petitioners were issued by an impartial magistrate, after viewing the film and determining probable obscenity, which warrants were served while Petitioners were showing the film (Tr. 110-111). As an incident to the arrests, made during the act of

showing the film previously viewed by the magistrate, the specifics of the act of showing, the film, was appropriated.

It is reiterated that Petitioners do not even intimate that the adversary hearing, within 72 hours of appropriation of the film, was not afforded Petitioners, all in accord with Ordinance 41-085, as amended, Section 1, in accord with Entertainment Ventures, *supra.*

There is no known U. S. Supreme Court decision specifically negating the procedures above outlined.

Permitting the orderly remandment of the Court of Criminal Appeals can accomplish a comprehensive inclusion in the record, for the benefit of any appellate court, of the precise procedures afforded the Petitioners, which this record does not contain. The confusion caused by the present incomplete record in the Court of Criminal Appeals is evident by its cursory, and obviously incorrect, conclusions as to what rights Petitioners were afforded at the time of arrest, under Section 1 of the evidentiary ordinance of the City, No. 41-183, as amended (not shown in this petition.) (Tr. 51).

With a complete record, an issue may exist.

II

The transcript shows in several places (Tr. 99-100, 105, 110-111) that Petitioners were present at the time of the showing of the film, one as manager, the other admittedly displaying the film and able to see it, when arrested. The jury question of "knowledge" of Petitioners is not for this Court, inasmuch as the City Obscenity Ordinance 36-022, as amended (Tr. 55), requires knowledge, and the Ordinance is not attacked on this issue on any grounds set out in Title 28, Section 1257(3).

III

The validity of the obscenity ordinance of the City at the time of the trial, under the U. S. Supreme Court rules prevailing at the time, has been considered in a case taken to the U. S. Supreme Court. We cite Ballew v. Robinson Case No. 71-292, October Term, 1971. That action consisted of a fifty-four page complaint attacking the City Ordinance 36-022 as amended by Ordinance 41-183 (Tr. 55), and actions resulting from its application in the U. S. District Court for the Southern District of Alabama resulted in a Judgment and Order of the District Court in part as follows: (Respondents' Brief, page A-26)

> "It is ordered, adjudged and decreed by the Court as follows:
>
> 1. The City of Mobile Ordinance No. 41-183 (Ordinance 36-022(2) as amended) is constitutional as written and petitioners' prayer to have the ordinance declared void is hereby denied."

The District Court was affirmed by the United States Court of Appeals for the Fifth Circuit, 447 F. 2d 584, May 1971; Cert. Den. Nov. 9, 1971.

We quote from the Conclusions of Law of the District Court (Respondent's Brief, page A-13):

> "The acts of the City based on its obscenity ordinance followed, in time, the decision of *Entertainment Ventures v. Brewer*, 306 F. Supp. 802. It is evident to me that the amendment of the City obscenity ordinance, and the method of its application by the City, follow the dictates of Entertainment Ventures.
>
> "None of the alleged grounds of unconstitutionality of the amended obscenity ordinance are applicable in view of the constructions arrived at in Entertainment Ventures. Specifically, I find as in that case the term 'utterly

without redeeming social value' is construed into the first sentence of the definition of obscenity found in the amended obscenity ordinance of the City. In fact, there can be no doubt that the City understands that such must be the case, as the ordinance states that (as a thing to be 'obscene' must be utterly without redeeming social value), such 'obscenity' obviously is utterly without redeeming social value and is therefore a public nuisance."

It appears to this Counsel that the action of the Court of Criminal Appeals of Alabama, in light of the above considerations, was an attempt to mime the U. S. Supreme Court in the *Miller v. California*, 93 S. Ct. 2607, 36 L. Ed. 2d and *Heller v. New York*, 93 S. Ct. 2789 (1973) cases. And from the above considerations, and the confusion of the Court of Criminal Appeals, remandment seems the only appropriate action.

CONCLUSION

Respondent respectfully represents to this Court that the Petition for a Writ of Certiorari should be denied, for lack of jurisdiction, as well as for the purposes cited by the Court of Criminal Appeals of Alabama.

Respectfully submitted

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